

Improving Corporate Criminal Fines: A Reply to W. Robert Thomas

ALEXANDER SARCH*

In response to W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601 (2017).

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In this insightful and well-argued article, W. Robert Thomas sets out to make progress on a long-standing problem for corporate criminal law: namely, the difficulties presented by using fines as the primary method of punishing corporations.¹ Thomas convincingly argues that corporate criminal fines do not do a particularly good job of promoting the goals of criminal punishment—*i.e.* deterrence, coupled with retributivist ends and the expression of societal condemnation.² He then defends a proposal for how corporate law can be reformed to enable corporate criminal fines to more effectively serve such goals.³ The result is a concrete and promising policy reform.

In this Response, I raise a number of critical questions for Thomas's arguments. Most importantly, several versions of Thomas's policy proposal are available, and one wonders why these alternatives would not be at least as desirable as the version Thomas himself endorses. In Parts I and II, I briefly recap the basics of Thomas's argument. Then in Part III, I subject them to a bit of critical scrutiny. Ultimately, Thomas's proposal is intriguing, and the aim of this Response is simply to continue the important conversation Thomas has begun.

* Reader (Associate Professor), University of Surrey School of Law.

¹ See generally W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601 (2017).

² *Id.* at 608–09.

³ *Id.* at 607–08.

I. THE BASIC PROBLEMS WITH CORPORATE CRIMINAL FINES

To begin with, Thomas seeks to sidestep a number of well-worn theoretical questions about the legitimacy of corporate criminal punishment. For one, he deftly evades thorny theoretical debates about whether corporations are the right kind of entity to be punished by the criminal law.⁴ Spoiler alert: Thomas shows that there is scant reason to doubt that they are.⁵ What is more, he attempts to circumvent the familiar “spillover objection” to corporate criminal fines.⁶ This is the worry that because corporate criminal fines harm shareholder value even when the shareholders themselves are not blameworthy actors, such fines violate “negative retributivism”—that is, the principle that punishment is just only if it harms culpable actors in proportion to their desert.⁷ Thomas is unimpressed with this objection because the problem is not “unique to corporate punishment.”⁸ Individual punishment, after all, also routinely harms innocent parties.⁹

Instead of fretting over these familiar theoretical objections to corporate criminal fines, Thomas is chiefly concerned with the more pressing practical problems that such fines encounter. The first main group has to do with the deterrent value of corporate criminal fines.¹⁰ One of their limitations is that they cease to be effective as deterrents as the corporation subjected to them moves closer to insolvency—a problem known as the “deterrence trap.”¹¹ Even more troublingly, fines do not deter managers particularly well because fines levied on the corporation are effectively paid with shareholder money.¹² Thomas quotes Larry Summers’ observation that “[m]anagers do not find it personally costly to part with even billions of dollars of their shareholders’ money.”¹³

The second main group of problems concerns the inability of fines to adequately express society’s condemnation of corporate crimes.¹⁴ As Thomas puts it, “the expressive problem with corporate–criminal fines is that there is nothing uniquely criminal” about them.¹⁵ After all, they are practically speaking

⁴ *Id.* at 608.

⁵ *Id.*

⁶ *Id.* at 618.

⁷ See Mitchell N. Berman, *The Justification of Punishment*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 141, 150–51 (Andrei Marmor ed., 2012) (distinguishing positive and negative retributivism).

⁸ Thomas, *supra* note 1, at 619.

⁹ *Id.* at 617–18.

¹⁰ *Id.* at 610.

¹¹ *Id.* at 611 (citing John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 390 (1981)).

¹² *Id.*

¹³ *Id.* (alteration in original) (quoting Lawrence Summers, *Companies on Trial: Are They ‘Too Big to Jail’?*, FIN. TIMES (Nov. 21, 2014), <http://www.ft.com/cms/s/0/e3bf9954-7009-11e4-90af-00144feabdc0.html> [<https://perma.cc/ZCD7-Q6FT>]).

¹⁴ Thomas, *supra* note 1, at 614.

¹⁵ *Id.* at 617.

indistinguishable from civil fines or any other event that negatively impacts the bottom-line.¹⁶ A “corporation absorbs the cost of a criminal fine in exactly the same way that it absorbs any other business cost—a civil fine, for example, or even just an exogenous shock from a bad investment.”¹⁷ As a result, it is no wonder that “corporations treat fines simply as ‘the cost of doing business.’”¹⁸ However, this conflicts with the axiom that punishments are meant to express the strongest form of condemnation of which society is able.¹⁹

II. THOMAS’S SOLUTION: A CORPORATE–CRIME CLAWBACK

To remedy these problems with corporate criminal fines, Thomas offers an intriguing proposal. Granted, it is only meant to *illustrate* the ways in which corporate law reforms can be fruitfully used to tackle pressing problems with punishing corporations—an important contribution that Thomas makes to the literature, to be sure.²⁰ Nonetheless, because the proposal is clearly and vigorously defended, it also bears closer scrutiny.

Thomas’s proposal consists of two components. First, he advocates modifying criminal fines so that the default rule is that the directorship is held jointly and severally liable for the entire cost of the corporate criminal fine (with rights of contribution).²¹ Second, he thinks this initially harsh-seeming change should be tempered by a corporate–crime clawback bylaw, which allows directors to decrease their personal exposure by clawing back funds from managers and other high-level employees to the extent that they were responsible for the crime of which the corporation is convicted.²² The sort of clawback that Thomas envisions should not be used to target earned income, but rather only incentive compensation like bonuses or stock options.²³

Under this double-barreled policy reform, corporate criminal fines would be significantly more defensible—*i.e.* would further the ends of the criminal law more effectively—than is the case under the existing regime.²⁴ For one thing, making directors individually liable for corporate criminal fines carries deterrent benefits.²⁵ After all, directors are in a better position than shareholders to affect the behavior of managers or other employees and thereby prevent criminal misconduct from occurring in the first place.²⁶ Moreover, this also would

¹⁶ *Id.* at 616.

¹⁷ *Id.* at 616–17 (footnote omitted).

¹⁸ *Id.* at 614.

¹⁹ *Id.* at 614–15.

²⁰ Thomas, *supra* note 1, at 602.

²¹ *Id.* at 645–46.

²² *Id.* at 647–48.

²³ *Id.* at 648.

²⁴ *Id.* at 657.

²⁵ *Id.* at 647.

²⁶ Thomas, *supra* note 1, at 647 (“[D]irectors are better positioned than shareholders to detect and prevent criminal misconduct.”).

establish a stark difference between a) corporate criminal fines, which would fall on directors in the first instance, and b) civil fines, which would be absorbed by shareholders in the same way as any other cost to the corporation.²⁷ As a result of this difference, corporate criminal fines would be better able to express a strong and uniquely criminal form of condemnation.²⁸

III. QUESTIONS

Thomas's corporate-crime clawback is an intriguing policy proposal with which I am very sympathetic. Nonetheless, the details merit closer investigation. In this Part, I raise three groups of questions about the specifics of how the policy is developed and defended.

A. *Why Not Some Other Version of the Clawback?*

To begin with, it would be helpful to hear more from Thomas about why his proposed corporate-crime clawback policy reform would only apply to directors—as opposed to other groups of stakeholders. Let us consider two alternative versions of his proposal in more detail.

1. *Shareholders*

One alternative worth considering, since it would require less radical reforms, would be to apply an analog of Thomas's clawback proposal to shareholders. Thomas points out that, under the existing regime, shareholders by default are the ones who absorb the costs of corporate criminal fines.²⁹ The trouble, he points out, is that shareholders do not have very powerful tools at their disposal to control the conduct of directors, managers or other employees.³⁰ However, this could be at least partially remedied by extending the second component of Thomas's proposal to shareholders: specifically, by instituting clawback mechanisms that would allow shareholders (or perhaps only certain classes thereof) to recoup the costs of corporate criminal fines from the directors, managers or other employees who are found to be responsible for the underlying criminal conduct (either by committing it, encouraging it, or failing to prevent it). To facilitate efficiency, such clawbacks could be accomplished through the same sort of internal procedures that Thomas discusses,³¹ rather than through time-consuming and costly lawsuits.

If Thomas's goal is to provide more effective ways for different stakeholders in the corporation to negotiate about how the harm of a corporate

²⁷ *Id.* at 646–47.

²⁸ *Id.* at 645.

²⁹ *Id.* at 616–17.

³⁰ *Id.* at 647–48 (“[U]nder the status quo shareholders have at best weak mechanisms to influence director activity.”).

³¹ *Id.* at 648–49.

criminal punishment will be distributed,³² why not give the tools he envisions directly to shareholders? The benefit this would confer is that it seems to largely obviate the need for the first component of Thomas's policy proposal—namely, the initial step of making directors jointly and severally liable for corporate criminal fines.³³ As a result, this more rudimentary version of Thomas's proposal would seem to constitute a smaller departure from the status quo. I do not claim this alternative proposal necessarily is superior to the version Thomas endorses. Rather, I only mean to point out that to accomplish a full defense of his proposal, it would be helpful to hear more about why his bolder proposal is superior to this more bare-bones version.

One possible answer that Thomas might avail himself of here is to claim that his version of the proposal, which applies only to directors, would offer *better* deterrence of corporate criminal misconduct than the shareholder version I've just outlined. Nonetheless, it is not obvious that this is the case. After all, if shareholders can claw back the costs of corporate criminal fines directly from the responsible parties within the corporation, we also can expect better deterrence of corporate crime than under the status quo, where shareholders can do nothing but bear the costs of fines. Thus, at the end of the day, this answer turns on an empirical claim, which may prove difficult to evaluate from the armchair.

In any event, it would be interesting to hear more about why making the clawback option available only to directors is preferable to offering it to shareholders directly.

2. *Managers*

While one question is why Thomas's proposal is to be preferred to a somewhat less radical alternative, there is also the converse question about whether Thomas's proposal perhaps should go *further* than he envisions. In particular, why not establish a default rule that joint and several liability for corporate criminal fines should apply to both directors *and certain groups of high-value employees with managerial responsibility*? In other words, why not change the default rule so that not only directors, but also *managers* should be held jointly and severally liable for corporate criminal fines in the first instance?

If Thomas's proposal is justified in part on the basis of enhanced deterrence of misconduct,³⁴ one wonders why there wouldn't be a stronger deterrence argument for applying his proposal not just to directors but also to managers. Similarly, one suspects that extending the proposal in this way could also strengthen the expressive force of corporate criminal fines by placing the burden of the punishment on a greater number of responsible actors. Finally, this expanded proposal might have the additional salutary effect of increasing the

³²Thomas, *supra* note 1, at 648.

³³*Id.* at 645–46.

³⁴*Id.* at 647.

likelihood that the victims of corporate crime would be fully compensated. By increasing the number of actors who are jointly and severally liable in the first instance, there is a smaller chance that victims will not be able to locate a sufficient number of deep pockets from which to claim compensation.

Thomas's proposal thus occupies a middle ground between the less radical shareholder clawback proposal and the expanded version that applies to both directors and managers. The case in favor of Thomas's own proposal would be strengthened if we were to hear more about why the middle position he occupies is superior to either of these alternatives.

B. *Contingent Expressive Benefits*

Thomas argues that one of the benefits of his proposal is that it would mark a clear difference between corporate criminal fines and civil fines, such that the former express a more serious form of condemnation than the latter.³⁵ However, one might have worries about whether this difference is sufficiently robust to establish a fundamental difference in kind between criminal condemnation and civil liability.

The trouble is this: Suppose Thomas's proposal is implemented and proves to be successful in reducing the incidence of misconduct within corporations. In this event, it seems very likely that support would emerge for incorporating similar tools into civil law as well. If one achieves greater deterrence by imposing joint and several liability for criminal fines on directors, then civil law reformers would of course take note and become interested in following up on that success themselves. After all, deterrence of misconduct is an important goal of civil liability as well.

Thus, the deterrence argument for Thomas's proposal on the criminal side may also end up supporting the imposition of civil liability directly on the directorship as well. Is it realistic to expect the private law to simply *decline* to adopt an effective deterrent mechanism simply to preserve the expressive force of corporate criminal fines? I suspect not. As a result, one worries that the success of Thomas's proposal would inevitably lead one of the main selling points of his view—its difference from civil law—to evaporate.³⁶

C. *The Spillover Problem Revisited*

Finally, Thomas's discussion of the spillover problem deserves more careful consideration.³⁷ In my view, his clawback proposal is not undermined by the spillover problem. However, this is actually for simpler reasons than he suggests.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 618–19.

Recall the way in which Thomas deals with the spillover problem. As seen above, Thomas initially attempts to defuse the problem by offering a “partners in guilt” response. He argues that although traditional corporate criminal fines end up burdening innocent parties—namely, shareholders—this is not fatal because this sort of spillover onto the innocent is not “unique to corporate punishment.”³⁸ Individual punishment, too, can harm the innocent, as when a child is deprived of support and comfort when her single parent is sentenced to jail time.³⁹

Nonetheless, it is not clear that this is a sufficient answer to the present problem across the board. For one thing, one might reply that if punishments routinely spill over onto the innocent in violation of negative retributivism, then our criminal law would routinely be doing injustice. Hence, one might argue it requires comprehensive reform.

There is also a deeper problem with the “partners in guilt” response. In particular, one might worry that corporate criminal fines involve a *substantially greater degree* of spillover onto the innocent than individual punishments do. On the one hand, we can expect that *some* cases of individual punishment will cause downstream harm to innocent third-parties (*e.g.* those with whom the defendant has a close relationship),⁴⁰ but we can also expect that this kind of spillover will not occur in *all* cases of individual punishment. By contrast, for traditional corporate criminal fines, we can expect innocent shareholders to be burdened in virtually every case. Thus, spillover will occur much more systematically and predictably on the corporate side than it does for individual punishments. For this reason, simply pointing out that all punishments can lead to spillover is not enough to defuse the spillover objection to corporate criminal fines in particular.

Accordingly, a different kind of answer to the spillover objection is necessary. Thomas himself notes as much when he predicts that some might object that his proposal does “nothing to change the fact that corporate punishment ‘punishes the innocent along with the guilty.’”⁴¹ As a result, when it comes to defending his own clawback proposal, Thomas proceeds to offer a different kind of answer.

In particular, Thomas’s second answer to the spillover problem is to argue that “[q]uestions of guilt and innocence are wholly orthogonal to the question of the preferred distribution of harm attendant to corporate punishment.”⁴² This tracks his earlier observation that for corporate punishments, we can distinguish between the “imposition of punishment” and the “distribution of harm.”⁴³ Thomas’s idea is that that his clawback proposal only concerns the distribution

³⁸ Thomas, *supra* note 1, at 606–07.

³⁹ *Id.* at 619.

⁴⁰ *Id.*

⁴¹ *Id.* at 653 (quoting Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009)).

⁴² *Id.* at 654.

⁴³ *Id.* at 642.

of punishment,⁴⁴ not the logically prior question of which actors are guilty of which offenses. Spillover would be problematic only if it involved the *imposition* of punishment onto innocent parties.⁴⁵ Distributional spillover, by contrast, is not similarly problematic. After all, once guilt has been ascertained and a punishment imposed, it is a separate question how the punishment is to be designed and inflicted. Accordingly, since Thomas's clawback proposal only deals with what to do *after* the court has determined that some punishment is to be imposed on the corporation for a criminal offense,⁴⁶ whatever spillover then results from the distribution of the punishment is not similarly troubling.

Nonetheless, there are two problems with this new answer to the spillover problem—one dialectical, the other more substantive. The dialectical problem is this: If distinguishing between imposition and distribution of punishment were sufficient to solve the spillover problem for Thomas's clawback proposal, then it would also succeed as applied to traditional corporate criminal fines. After all, the fact that corporate criminal fines get distributed to shareholders when all is said and done is also just a fact about distribution of punishment, not its imposition. However, we saw above that traditional corporate criminal fines remained problematic even so. After all, traditional corporate criminal fines systematically create a greater degree of spillover than individual punishments. As a result, if distinguishing between imposition and distribution does not remove the spillover problem for traditional criminal fines, one wonders how this distinction by itself could solve the spillover problem for other forms of punishment like Thomas's clawback proposal.

The second, more substantive problem is that the requirement of criminal desert—what I above called negative retributivism—places constraints not just on the imposition of punishment, but also on its distribution.⁴⁷ In other words, the idea that we may not punish the innocent goes further than the following familiar restriction of the *objects* of punishment:

Desert Constraint 1 (Imposition): The imposition of a given amount of punishment X on defendant D is just only if, in virtue of his wrongdoing, D deserves an amount of punishment equal to X.

Beyond this rudimentary desert constraint, it is very plausible that desert also places outside limits on how punishment may permissibly be distributed. At a minimum, distributions that predominantly burden innocent parties would also be ruled out as unjust. More precisely, we can put the thought as follows:

Desert Constraint 2 (Distribution): Where punishment X is legitimately imposed on a corporation for a criminal offense, it is unjust to distribute X

⁴⁴ Thomas, *supra* note 1, at 648.

⁴⁵ *Id.* at 642–43.

⁴⁶ *Id.* at 649.

⁴⁷ See *supra* note 7 and accompanying text.

in such a way that the burdens of X come to rest solely or predominantly on innocent parties, while those who were responsible for causing for the underlying criminal offense completely or substantially avoid bearing the burden of X.

Why is this a problem? If I'm right that there is also a desert constraint on the distribution of punishment, then simply distinguishing between imposition and distribution of punishment is not by itself enough to defuse the spillover problem. For example, while traditional corporate criminal fines would not violate the first desert constraint on imposing punishment, it very plausibly would violate the second one, concerning distribution. After all, the burdens of traditional corporate criminal fines fall predominantly on innocent shareholders, not the parties within the corporation who are likely to have caused the underlying criminal offense. As a result, more is needed than distinguishing imposition from distribution of punishment in order to avoid the spillover problem.

Fortunately for Thomas, his proposal actually has additional resources at its disposal. Although he doesn't make much of them, these additional resources can be used to provide a more satisfying answer to the spillover problem. As a proposal only about how corporate punishments are to be distributed, it of course does not run afoul of Desert Constraint 1, concerning imposition. Rather, the question is whether it runs into trouble with Desert Constraint 2, concerning distribution.

As it turns out, Thomas's proposal seems to fare substantially better than traditional corporate criminal punishments on this score. One might be forgiven for thinking that making directors jointly and severally liable for corporate criminal fines violates Desert Constraint 2. However, this would be to forget the second component of Thomas's proposal. The opportunity that directors would have to claw back funds from the responsible parties will substantially reduce the amount of spillover that innocent parties end up suffering when compared with traditional corporate criminal fines. Rather than allowing fines to be solely absorbed by innocent shareholders with the responsible parties experiencing little or no effect, under Thomas's proposal, the burdens of corporate criminal fines would ultimately come to rest mainly on those who were responsible for the underlying offense.⁴⁸ Although making directors jointly and severally liable for fines initially *risks* a distribution of punishment that violates Desert Constraint 2, Thomas's proposal contains straightforward mechanisms that allow the initially unjust distribution to be rectified.⁴⁹ Thus, because of the clawback component in Thomas's proposal, his view in fact seems to fare better with respect to the spillover objection than traditional corporate criminal fines.

I belabor this point because Thomas's own discussion seems to undersell the strengths of his clawback proposal as an answer to the spillover objection.

⁴⁸ Thomas, *supra* note 1, at 645.

⁴⁹ *Id.* at 647.

While I do not think his distinction between imposition and distribution of punishment provides a blanket defense of corporate criminal fines, his own substantive policy proposal shows that some methods of distributing punishment involve much less spillover than others.

In this way, Thomas shows—perhaps more than he acknowledges—a more promising way to answer skeptics of corporate criminal fines. Rather than seeking to show that their concerns about spillover are misguided from the get-go, the better answer is to construct mechanisms for levying corporate criminal fines that are more consistent with the desert constraint.

IV. CONCLUSION

Thomas offers an intriguing attempt to improve the way in which corporate criminal fines operate in the real world. In this Response, I have attempted to show that other versions of Thomas's proposal are also worth investigating in order to home in on the most optimal implementation of the sort of clawback mechanism he advocates. Moreover, I have attempted to show that his proposed clawback mechanism in fact fares better with respect to the spillover problem than traditional corporate criminal fines. Rather than shying away from the spillover problem entirely, Thomas would be well-served by claiming the virtues of his proposal in minimizing spillover as an additional benefit of his reforms compared to the status quo.